Federal Court  Cour fédérale

Date: 20150224

Docket: IMM-637-14
IMM-640-14

Citation: 2015 FC 231

Ottawa, Ontario, February 24, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ARLENE KANEZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Arlene Kaneza (the Applicant) has brought two applications for judicial review. The first (IMM-637-14) concerns a determination by Citizenship and Immigration Canada (CIC), following a Pre-Removal Risk Assessment (PRRA), that she will not be subject to a risk of persecution, torture, risk to life, or cruel or unusual treatment or punishment if she is returned to Burundi. The second (IMM-640-14) concerns a denial by CIC of the Applicant's request for an

exemption to enable her to apply for permanent resident status from within Canada based on humanitarian and compassionate (H&C) grounds.

[2] For the reasons that follow, the first application for judicial review is dismissed. The second application for judicial review is allowed, and the matter remitted to a different immigration officer for reconsideration of the best interests of the Applicant as a child.

I. Background

[3] According to the Immigration Officer's written decisions, the Applicant's requests for a PRRA and exemption based on H&C grounds were based on the following contentions.

[4] The Applicant is a citizen of Burundi. At the time she entered Canada she was 17 years old.

[5] On October 15, 2011, the Applicant witnessed a female schoolmate being raped by a group of four young men. She believed the men to be members of the Imbonerakure, which she described as a powerful militia associated with Burundi's ruling party, the National Council for the Defence of Democracy – Forces for the Defence of Democracy. She recognized one of the assailants as a fellow schoolmate.

[6] The male schoolmate found her at school, and threatened to kill her if she revealed what she had seen. The Applicant had already informed a friend at school. Two days later, the male

schoolmate told the Applicant that she had not kept her promise and that she was going to pay the price.

[7] On October 25, 2011, while the Applicant was waiting for a taxi outside her home to visit her aunt, a taxi stopped and a young man got out and forced her inside the car. She was sexually assaulted in the taxi by a group of young men including her male schoolmate. They threatened to rape her before killing her.

[8] The Applicant accidentally punched the driver while trying to fight off her assailants. The driver lost control of the car and collided with a Jeep. The assailants fled the scene and the driver of the Jeep returned her to her home.

[9] After the Applicant's father discovered what had happened, he decided that the Applicant should leave Burundi. He obtained a visa for her to travel to the United States of America (USA). On December 17, 2011, the Applicant left Burundi with her father destined for the USA.

[10] On December 19, 2011, the Applicant arrived at the Canadian border by herself.

[11] On March 26, 2012, the Applicant submitted an application based on H&C grounds, which was denied by the Immigration Officer. On April 23, 2012, she submitted a request for a PRRA, which resulted in a determination against the Applicant by the same Officer.

[12] The Applicant was scheduled for removal to Burundi on March 27, 2014. On March 26, 2014, Justice Boivin ordered a stay of the Applicant's removal order until her application for leave and judicial review of the PRRA decision was finally determined.

[13] The Applicant submitted the following in support of her PRRA: i) an undated letter from the Applicant; ii) a letter from her lawyer dated May 13, 2012; iii) a psychological report dated 10 May 2012; and iv) news articles and country condition reports. The Immigration Officer also considered material contained in the Applicant's H&C application.

[14] Because she arrived at the Canadian border from the USA, the Applicant is ineligible to apply for refugee protection under paragraph 101(1)(e) of the *Immigration and Refugee Protection Act*, the safe third country provisions.

[15] The Immigration Officer concluded that the Applicant was unable to demonstrate that she is a political opponent of the Imbonerakure and would therefore be targeted by them. The Officer acknowledged that the Applicant had submitted a psychological report to support her fear of harm at the hands the Imbonerakure. However, the Officer gave the psychological report low probative value, because the psychologist was not a first-hand witness to the incidents.

[16] Based on a review of publicly available documents, the Immigration Officer noted that the Imbonerakure sometimes attack political opponents and their relatives. Elderly women and those with a mental or physical disability are more likely to be targeted for rape. Rape victims in Burundi tend to resolve the issue informally with their aggressors. They fear reprisal and

stigmatization, and they are often unaware of the procedures to seek justice. However, the Officer found that this did not demonstrate that the Imbonerakure are generally prone to attack women and sexually assault them. The Officer noted that the Applicant did not provide other evidence to substantiate her allegations. The Officer therefore concluded that the Applicant had not demonstrated that she was a victim of sexual assault at the hands of the Imbonerakure, and that this group wants to harm her.

[17] The Immigration Officer also examined the Applicant's profile as a 19-year-old woman. The Officer acknowledged human rights problems in Burundi, and concluded that many women are reluctant to report rape for cultural reasons. Nevertheless, there are services available in Burundi to help women with counselling and reintegration. The Officer found that the Applicant did not demonstrate that she could potentially face problems if she returns to Burundi. The Officer also found that the Applicant did not submit personalized evidence to demonstrate that, as a woman, she could be harmed in Burundi.

[18] The Immigration Officer summarised his conclusion on the PRRA as follows:

> The human rights situation is not without problems in Burundi. Nevertheless, the applicant did not submit personalized evidence demonstrating the presence of a personal risk of return to Burundi. Furthermore, she did not demonstrate that her situation is different from the rest of the population in such a way that it would place her at risk based on her personal profile including that of being a woman.

[19] The Immigration Officer found against the Applicant on the PRRA, concluding that she had not demonstrated that there is more than a mere possibility of a well-founded fear of

persecution under section 96 of the *Immigration and Refugee Protection Act*. Further, the Applicant did not establish on a balance of probabilities that she is personally subject to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the *Convention Against Torture*; or to a risk to her life or to a risk of cruel and unusual treatment or punishment under section 97 of the Act.

[20] With respect to the Applicant's H&C application, the Immigration Officer found that the Applicant was unable to demonstrate that she would suffer unusual and undeserved or disproportionate hardship if her establishment in Canada and links to Canadian society were severed. The Officer noted that the Applicant did not submit evidence to support her claim of financial support from a paternal aunt and an organization named PRADA. The Applicant did not identify any other factors to demonstrate her establishment in Canada or ties to Canadian society. The Officer observed that it would not be unreasonable for the Applicant to return to her native country after being in Canada for only two years, given that she was born in Burundi, spent most of her life there, and has relatives there to support her re-establishment.

[21] While the psychological report stated that the Applicant experiences nightmares and headaches, the Immigration Officer found that this did not indicate that the Applicant suffers from a mental or physical condition that could prevent her from being autonomous.

[22] The Immigration Officer acknowledged that the Applicant arrived in Canada as a minor child. The Officer cited the legal requirement to be "alert, alive and sensitive" to the best interests of the child (BIOC) when conducting an H&C analysis. However, the Officer

determined that the Applicant had not provided sufficient information regarding the BIOC. The Officer was therefore not satisfied that the BIOC in this case warranted an exemption to filing an application for permanent residence from abroad.

[23] The Immigration Officer's analysis of country conditions in Burundi and the probative value of the psychological report submitted by the Applicant were similar to the Officer's analysis that preceded the adverse decision on the PRRA. Accordingly, the Officer concluded that the Applicant would not face unusual and undeserved or disproportionate hardship should she be returned to Burundi.

II. Issues

[24] The issues raised in these applications for judicial review are the following:

A. Did the Immigration Officer apply the correct test in conducting the PRRA, and if so, was the Officer's conclusion reasonable?

B. Did the Immigration Officer apply the correct test in considering the BIOC, and if so, was the Officer's conclusion reasonable?

C. Should there be an award of costs in favour of the Applicant?

III. Analysis

Did the Immigration Officer apply the correct test in conducting the PRRA, and if so, was the Officer's conclusion reasonable?

[25] Whether the Immigration Officer applied the correct legal test in conducting the PRRA is reviewable on the standard of correctness. The Officer's application of the test to the facts at issue is a question of mixed fact and law and reviewable on the standard of reasonableness, and is generally afforded deference by this Court (*Talipoglu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 172 at para 22). An applicant must demonstrate that there is more than a mere possibility of persecution (*Chan v Canada (Minister of Employment of Immigration)*, [1995] 3 SCR 593 at para 120). Women who fear persecution due to their gender, and women who fear rape, may constitute particular social groups pursuant to s. 96 of the *Immigration and Refugee Protection Act* (*Josile v Canada (Citizenship and Immigration)*, 2011 FC 39 at para 24).

[26] The Applicant takes issue with the Immigration Officer's conclusion that the Applicant "did not demonstrate that her situation is different from the rest of the population in such a way that it would place her at risk based on her personal profile including that of a being a woman." She asserts that the Officer required the Applicant to prove a risk that was different from that faced by the rest of the population, rather than demonstrate something more than a mere possibility of persecution.

[27] Counsel for the Respondent conceded that the Immigration Officer's decision was "inelegant". I agree with the Applicant that the Immigration Officer was wrong to require the

Applicant to demonstrate a level of risk that differs from the rest of the Burundi population. However, the correct formulation of the legal test appears in the Immigration Officer's conclusion. Furthermore, read as a whole, the decision confirms that the Immigration Officer's attention was properly directed towards whether the Applicant faced more than a mere possibility of persecution if she returned to her native Burundi.

[28] The Immigration Officer acknowledged that "it is possible that the applicant was a victim of sexual assault," but then concluded that "the applicant did not demonstrate that she was a victim of sexual assault at the hands of the Imbonerakure and that this group wants to harm her." The Applicant states that it is unclear whether the Immigration Officer doubted that the Applicant was a victim of sexual assault, that the agent of persecution was the Imbonerakure, or that there is an ongoing threat of harm to the Applicant.

[29] The Applicant argues that the Immigration Officer made implicit adverse findings of credibility, and an oral hearing should have been convened to address them (*Latifi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1388 at paras 44-65). The Respondent submits that the Officer did not make an adverse finding of credibility against the Applicant, but rather concluded that the evidence presented was insufficient to establish that the Applicant faced more than a mere possibility of persecution in Burundi. According to the Respondent, the Applicant was required to provide evidence to establish a forward-looking, objective basis for her fear, and it was open to the Immigration Officer to ascribe little probative value to her unsworn statements. The Respondent contends that an adverse finding of credibility finding is distinct from an applicant's failure to meet his or her burden of proof on the balance of

probabilities (*Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 17). I agree.

[30] In *Herman*, Justice Crampton, as he then was, quoted *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 as follows: "It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to … [the question as to whether the evidence is credible] is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence." Justice Crampton continued:

> I am satisfied that in the case at bar, the PRRA Officer was not cloaking adverse credibility findings in conclusions that the evidence adduced by the Applicant was not sufficient. In each instance, it was reasonably open to the PRRA Officer to conclude, without making an adverse credibility finding, that the evidence adduced was not sufficient to establish, on a balance of probabilities, the claims advanced by the Applicant.

[31] Counsel for the Applicant conceded that the evidence tendered in support of the PRRA application could have, and indeed should have, been better. This evidence consisted of an undated and unsworn written document prepared by the Applicant, a supporting letter from her lawyer, a psychological report that was based on two interviews with the Applicant, news articles and country condition reports. As noted by the Immigration Officer, "she did not submit a police report, a medical document supporting her allegations, a letter from her father or any other relative or witness that could corroborate her allegations ..."

[32] In my view, this case is similar to *Herman* and *Ferguson*, and it was reasonably open to the PRRA Officer to conclude, without making an adverse credibility finding, that the evidence adduced was not sufficient to establish, on a balance of probabilities, the claims advanced by the Applicant. I therefore disagree with the Applicant that it was necessary for the Immigration Officer to convene an oral hearing to give the Applicant an opportunity to buttress a fundamentally weak case.

[33] I would accordingly dismiss the Applicant's application for judicial review of the Immigration Officer's adverse determination of the PRRA.

Did the Immigration Officer apply the correct test in considering the BIOC, and if so, was the Officer's conclusion reasonable?

[34] Whether the Immigration Officer applied the correct legal test for assessing the BIOC is a question of law to be reviewed on the standard of correctness (*Judnarine v Canada (Minister of Citizenship and Immigration)*, 2013 FC 82 at para 15). The officer's treatment of the evidence is to be reviewed on the standard of reasonableness (*Mandi v Canada (Minister of Citizenship and Immigration*), 2014 FC 257 at para 19).

[35] The Applicant submits that the officer failed to apply the correct BIOC test, and instead simply determined that there was a "lack of sufficient details and [a] lack of evidence regarding the BIOC." She argues that the long-standing jurisprudence of this Court requires that an officer conducting a BIOC analysis be "alert, alive and sensitive." (*Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165).

[36] When assessing a child's best interests, an Immigration Officer must establish first what is in the child's best interest; second, the degree to which the child's interests are compromised by one potential decision over another; and then finally, in light of the foregoing assessment, determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application (*Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at paras 64-65; and *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 258 at para 66). This is followed by a weighing of the BIOC in the overall H&C decision. The Officer must balance the hardship of removal against other factors that might mitigate the adverse consequences of removal (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 5).

[37] The Applicant argues that, while the evidentiary record may have been wanting, this did not relieve the Immigration Officer of the obligation to conduct a proper BIOC analysis.

[38] In *Kolosovs*, Justice Campbell explained the meaning of "alert, alive and sensitive" as follows:

> [9] The word alert implies awareness. When an H&C application indicates that a child will be directly affected by the decision, a visa officer must demonstrate an awareness of the child's best interests by noting the ways in which those interests are implicated.
>
> […]
>
> [11] Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is

> necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably determined.
>
> [12] It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief.

[39] According to section 5.19 of the CIC Operational Manual IP 5 – "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", factors relating to a child's emotional, social, cultural, physical and educational welfare should be taken into account when they are raised. These may include:

- the age of the child;
- the level of dependency between the child and the H&C applicant;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the H&C decision is being considered;
- medical issues or special needs the child may have;
- the impact to the child's education;
- matters related to the child's gender.

[40] In this case, the Immigration Officer acknowledged the Applicant's status as a minor child. However, because the Applicant did not provide sufficient information regarding the BIOC beyond the allegations of harm in Burundi, the Officer was not satisfied that the BIOC

warranted an exemption from the requirement to file an application for permanent residence from abroad.

[41] The Respondent attempted to distinguish the jurisprudence of this Court regarding the BIOC on the ground that in this case the Applicant is herself the child. Ordinarily, the Court is asked to consider the BIOC in the context of an application by another person, typically a parent, who does not have status in Canada.

[42] In *Beharry v Canada (Citizenship and Immigration)*, 2011 FC 110, the applicant and her two minor children all applied for permanent residence on H&C grounds. None of them had status in Canada. Justice Mactavish concluded that the immigration officer had failed to conduct a proper BIOC analysis, and allowed the application for judicial review:

> [14] As the Federal Court of Appeal observed in *Hawthorne*, immigration officers are presumed to know that living in Canada can afford many opportunities to a child that may not be available in the child's country of origin. The task of the officer is thus to assess the degree of hardship that is likely to result from the removal of the child from Canada, and then to balance that hardship against other factors that might mitigate the consequences of removal: see also *Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1175 (CanLII), [2009] F.C.J. No. 1474, at para. 31.
>
> [15] In other words, the Officer had to determine whether the children's best interests, "when weighed against the other relevant factors, justified an exemption on H&C grounds so as to allow them to enter Canada": *Kisana v. Canada (MCI)*, 2009 FCA 189 (CanLII), at para. 38. That is not what happened here.

[43] This case is similar. The Immigration Officer did not specifically evaluate the interests of the Applicant as a minor child, how they would be affected by removal, and the suffering that could result from an adverse decision. There was no mention in the Officer's BIOC analysis of the risk of psychological harm if the Applicant is deported to Burundi, despite some evidence having been adduced to this effect. Nor was any serious consideration given to the impact of removal on the Applicant's education or matters related to her gender, having regard to the prevalence of sexual and gender-based violence in Burundi.

[44] I am therefore of the view that the Immigration Officer applied the incorrect test in assessing the BIOC, and the decision as a whole did not fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The application for judicial review of the denial of the Applicant's request for an exemption to enable her to apply for permanent resident status from within Canada based on H&C grounds is allowed.

Should there be an award of costs in favour of the Applicant?

[45] Success on the two applications for judicial review was mixed. Nor are there any special reasons that would justify an order of costs in accordance with Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. Accordingly, no costs are awarded to either party.

Certified question

[46] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of a determination by CIC, following a PRRA, that the Applicant will not be subject to a risk of persecution, torture, risk to life, or cruel or unusual treatment or punishment if she is returned to her country of origin (IMM-637-14) is dismissed.

2. The application for judicial review of the denial by CIC of the Applicant's request for an exemption to enable her to apply for permanent resident status from within Canada based on H&C grounds (IMM-640-14) is allowed, and the matter is remitted to a different immigration officer for re-determination.

3. No serious question of general importance is certified.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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